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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

**GUIDELINES FOR TRIAL AND FINAL PRETRIAL CONFERENCE  
IN CIVIL BENCH CASES  
BEFORE THE HONORABLE WILLIAM ALSUP**

**FRCP 26(a)(3) DISCLOSURES**

1. All parties are reminded of their disclosure duties under FRCP 26(a)(3), which begin **THIRTY CALENDAR DAYS** before trial. The FRCP 26(a)(3)(A)(ii) requirement for designating deposition transcripts, however, need not be done until later, as set forth below, although the name of each trial witness to appear by deposition must be so designated at least **THIRTY CALENDAR DAYS** before trial.

**FINAL PRETRIAL CONFERENCE**

2. At least **SEVEN CALENDAR DAYS** in advance of the final pretrial conference, please file the following:

- (a) A joint proposed final pretrial order, signed and vetted by all counsel, that contains: (i) a brief description of the substance of claims and defenses which remain to be decided, (ii) a statement of all relief sought, (iii) all stipulated facts, (iv) a list of all factual issues which remain to be tried, (v) a joint exhibit list in numerical order, including a brief description of the exhibit and Bates numbers, a column for when it is offered in evidence, a column for when it

1 is received in evidence, and a column for any limitations on its use, and (vi) each  
2 party's separate witness list for its case-in-chief witnesses (including those  
3 appearing by deposition) providing, for all such witnesses other than an individual  
4 plaintiff and an individual defendant, a short statement of the substance of his/her  
5 testimony and, separately, what, if any, non-cumulative testimony the witness will  
6 give (to be used to set time limits). Items (v) and (vi) should be appendices to the  
7 proposed order.

8 (b) Any motion *in limine*, with the opposition, filed as follows:

9 At least **TWENTY CALENDAR DAYS** before the conference, serve, but do not yet  
10 file, the moving papers. At least **TEN CALENDAR DAYS** before the conference,  
11 serve the oppositions. When the oppositions are received, the moving party  
12 should collate the motion and the opposition together, back to back, and then file  
13 the paired sets at least **SEVEN CALENDAR DAYS** before the conference.

14 Each motion should be presented in a separate memo and numbered as in,  
15 for example, "Plaintiff's Motion in Limine No. 1 to Exclude . . . ." Please limit  
16 motions *in limine* to circumstances that really need a ruling in advance. In bench  
17 trials, usually three or fewer motions per side is sufficient at the conference stage  
18 (without prejudice to raising matters *in limine* as the trial progresses).

19 Each motion should address a single topic, be separate, and contain no more than  
20 seven pages of briefing per side.

21 (c) Copies of the Rule 26(a)(3) disclosures.

22 (d) Each side's proposed findings of fact and conclusions of law.

23 (e) Trial briefs are optional.

24 3. The above shall be submitted in *Word Perfect X3 or 10 format* to  
25 whapo@cand.uscourts.gov and in hard copies. *All hard-copy submissions should be three-hole*  
26 *punched on the left, so the judge's copy can be put in binders. Please provide them at least*  
27 *seven calendar days prior to the pretrial conference for the judge's study and review — THIS IS*  
28 *IMPORTANT.*



1 notice is given that no documents will be used, then all other counsel must give written notice of  
2 all other exhibits to be used on cross-examination (except for true impeachment) by 2:00 p.m. on  
3 the calendar day immediately preceding the testimony; otherwise, other responding counsel need  
4 not give notice of exhibits they may use. Any exhibit timely noticed by anyone for the witness is  
5 usable as if timely noticed by everyone, subject to substantive objections. Similarly, if reference  
6 is made to an exhibit during an examination (even if not offered in evidence and even if not  
7 noticed for use with the witness), then in any follow-up examination by others, the exhibit may  
8 be used to the same extent as if it had been timely noticed, subject to substantive objections.  
9 All notices shall be sent by fax or electronically and be time-and-date verifiable. If counsel  
10 decides not to call a noticed witness, then prompt written notice of the cancellation must be  
11 given. Impeachment exhibits are ordinarily limited to statements signed by or adopted by the  
12 witness. Compliance with a two-day notice period, of course, will not satisfy compliance with  
13 FRCP 26 or any other disclosure rule.

14 10. The official tagged exhibit should be shown to witnesses — not supposed copies  
15 or notebooks of supposed copies. Before the examination begins, retrieve the official tagged  
16 exhibits to be used and have them at the ready. Using copies leads to discrepancies between the  
17 exhibit actually introduced into the record (*always* the official tagged exhibit) versus the stray  
18 before the witness. The required procedure also helps find any glitches in the official tagged  
19 exhibits.

20 11. Always have your next witness ready and in the courthouse. Failure to have the  
21 next witness ready or to be prepared to proceed with the evidence will usually constitute resting.  
22 If counsel plans to read in a transcript of a deposition anyway, it is advisable to have a deposition  
23 prepared and vetted early on to read “just in case.”

24 12. When there are multiple parties, counsel are responsible for coordination of the  
25 cross-examination to avoid duplication. Stand at or near the microphone to ask questions,  
26 straying only to point out material on charts or overheads. Please request permission to approach  
27 the witness or the bench.  
28

**EXPERTS**

1  
2 13. A recurring problem in trials is the problem of expert witnesses trying to go  
3 beyond the scope of their expert reports on direct examination. FRCP 26(a)(2) and FRCP 37(c)  
4 limit experts to the opinions and bases contained in their timely reports (absent substantial  
5 justification or harmlessness). The Court regularly enforces these rules. FRCP 26(a) also  
6 requires that any “exhibits to be used as a summary of or support for the opinions” be included in  
7 the report. Accordingly, at trial, the direct testimony of experts will be limited to the matters  
8 disclosed in their reports. New matter may not ordinarily be added on direct examination.  
9 This means the reports must be complete and sufficiently detailed. Illustrative animations,  
10 diagrams, charts and models may be used on direct examination only if they were part of the  
11 expert’s report, with the exception of simple drawings and tabulations that plainly illustrate what  
12 is already in the report, which can be drawn by the witness at trial or otherwise shown to the  
13 jury. If cross-examination fairly opens the door, however, an expert may go beyond the written  
14 report on cross-examination and/or re-direct examination. By written stipulation, of course, all  
15 sides may relax these requirements. Material in a “reply” report must ordinarily be presented in  
16 a party’s rebuttal (or sur-rebuttal) case *after* the other side’s expert has appeared and testified.

17 14. Another recurring problem is the retained expert who seeks to vouch for the  
18 credibility of fact witnesses and/or to vouch for one side’s fact scenario. Qualified experts,  
19 of course, are always welcome to testify concerning relevant scientific principles, professional  
20 standards, specialized facts known within a trade or discipline and the like. They are also  
21 welcome to apply those principles and standards to various assumed fact scenarios. This is so  
22 even if an opinion is given on the “ultimate issue.” But they should not try to vouch for one  
23 side’s fact scenario. *i.e.*, witness believability.

24 15. There is an important exception. Experts and doctors who perform scientific  
25 tests, site visits or treat victims, among other possibilities, may testify to their findings within the  
26 scope of their firsthand knowledge. This is because they have made personal observations and  
27 have reached professional judgments based thereon. Carrying this one step further, even a  
28 retained expert may read a financial statement in evidence, watch a video in evidence, listen to a

1 recording in evidence and so on, and offer opinions based on the contents. This is because the  
2 contents themselves are clearly defined.

3 16. As to damages studies, the cut-off date for *past damages* will be as of the expert  
4 report (or such earlier date as the expert may select). In addition, the experts may try to project  
5 *future damages* (i.e., after the cut-off date) if the substantive standards for future damages can be  
6 met. With timely leave of Court or by written stipulation, the experts may update their reports  
7 (with supplemental reports) to a date closer to the time of trial.

#### 8 **USE OF DEPOSITIONS TO IMPEACH AND SHORT READ-INS**

9 17. Depositions can be used at trial to impeach a witness testifying at trial or, in the  
10 case of a party deponent, “for any purpose.” Please follow the following procedure:

11 (a) On the first day of trial, be sure to bring the original and clean  
12 copies of any deposition(s) for which you are responsible. Any corrections must  
13 be readily available. If you are likely to need to use the deposition during a  
14 witness examination, then give the Court a copy with any witness corrections at  
15 the outset of your examination. This will minimize delay between the original  
16 question and the read-ins of the impeaching material. Opposing counsel should  
17 have their copy immediately available.

18 (b) When you wish to read in a passage, simply say, for example:  
19 “I wish to read in page 210, lines 1 to 10, from the witness’ deposition.” A brief  
20 pause will be allowed for any objection.

21 (c) When reading in the passage, state “question” and then read the  
22 question exactly. Then state “answer” and then read the answer exactly.  
23 Stating “question” and “answer” is necessary so that the judge and court reporter  
24 can follow who was talking at the deposition.

25 (d) The first time a deposition is read, state the deponent’s name, the  
26 date of the deposition, the name of the lawyer asking the question, and if it was  
27 FRCP 30(b)(6) deposition, please say so.  
28

1 (e) Please do **NOT** ask, “Didn’t you say XYZ in your deposition?”  
2 The problem with such a question is that the “XYZ” rarely turns out to be  
3 exactly what the deponent said and is part spin. Instead, ask for permission to  
4 read in a passage, as above, and read it in exactly, without spin.

5 (f) Subject to Rule 403, party depositions may be read in whether  
6 or not they contradict (and regardless of who the witness is on the stand).  
7 For example, a short party deposition excerpt may be used as foundation for  
8 questions for a different witness on the stand.

9 (g) Rather than reading the passage, counsel are free to play an  
10 audiovisual digitized version of the passage but counsel must have a system for  
11 immediate display of the precise passage.

#### 12 **DEPOSITION DESIGNATION**

13 18. The following procedure applies only to witnesses who appear by deposition.  
14 It does not apply to live witnesses whose depositions are read in while they are on the stand.  
15 To save time and avoid unnecessary work, it is not necessary to make all deposition  
16 designations before trial (as normally required by FRCP 26(a)(3)(A)(ii)). In the Court’s  
17 experience, by the time the read-in occurs, the proponent has usually reduced substantially the  
18 proposed read-ins. Instead, the following steps should be followed.

19 (a) To designate deposition testimony, photocopy the cover page, the  
20 page where the witness is sworn, and then each page from which any testimony is  
21 proffered. Line through or x-out any portions of such pages not proffered.  
22 Also, line through objections or colloquy unless they are needed to understand the  
23 question. Please make sure any corrections are interlineated and that references  
24 to exhibit numbers are conformed to the trial numbers. Such interlineations  
25 should be done by hand. The finished packet should then be the actual script and  
26 should smoothly present the identification and swearing of the witness and  
27 testimony desired. The packet should be provided to all other parties at least **FIVE**  
28

1 CALENDAR DAYS before it will be used in court. For the rare case of voluminous  
2 designations, more lead time will be required. Please be reasonable.

3 (b) All other parties must then promptly review the packet and  
4 highlight in yellow any passages objected to and write in the margin the legal  
5 basis for the objections. If any completeness objection is made, the objecting  
6 party must insert into the packet the additional passages as needed to cure the  
7 completeness objection. A completeness objection should normally be made only  
8 if a few extra lines will cure the problem. Such additions shall be highlighted in  
9 blue and an explanation for the inclusion shall be legibly handwritten in the  
10 margin. Please line out or x-out any irrelevant portions of the additional pages.

11 (c) The packets, as adjusted, must then be returned to the proffering  
12 party, who must then decide the extent to which to accept the adjustments.  
13 The parties must meet and confer as reasonable. Counsel for the proffering party  
14 must collate and assemble a final packet that covers the proffer and all remaining  
15 issues. At least **TWO CALENDAR DAYS** before the proffer will be used, the  
16 proponent must provide the Court with the final packet, with any objected-to  
17 portions highlighted and annotated as described above. If exhibits are needed to  
18 resolve the objections, include copies and highlight and tag the relevant passages.  
19 Alert the Court on the record that the packet is being provided and whether any  
20 rulings are needed. *Tag all passages that require a ruling.* The Court will then  
21 read the packet and indicate its rulings. Ordinarily, argument will not be needed.

22 (d) Counter designations must be made by providing a packet with the  
23 counter-designated passages to the proponent at the same time any objections to  
24 the original proffer are returned to the first proffering party, who must then supply  
25 its objections in the same manner.

26 (e) When the packet is read in court, the examiner reads the questions  
27 (and any relevant colloquy) from the lectern and a colleague sits in the witness  
28 stand and reads the answers. When a video-taped deposition is to be played

1 instead, the packets must still be prepared, as above, in order to facilitate rulings  
2 on objections. The video should omit any dead time, long pauses, and  
3 objections/colloquy not necessary to understand the answers.

4 **REQUESTS FOR ADMISSIONS AND INTERROGATORIES**

5 19. Please designate responses to requests for admissions and interrogatory answers  
6 in the same manner and under the same timetable as depositions.

7 **EXHIBITS**

8 20. As stated, FRCP 26(a)(3) disclosures regarding proposed exhibits must be made  
9 at least **THIRTY CALENDAR DAYS** before trial and any objections thereto must be made within  
10 **FOURTEEN CALENDAR DAYS** thereafter (or waived unless excused for good cause). The joint  
11 list must be filed **SEVEN CALENDAR DAYS** in advance of the final pretrial conference (as per  
12 paragraph 2 above). By designating an exhibit, a party waives any objection to it if offered by  
13 the other side (even if not designated by the other side) except for objections based on Rule 402  
14 or Rule 403. Nor will there be any waiver with respect to admissions by party opponents,  
15 *i.e.*, such admissions may be designated without waiving the objection that the same items  
16 would be self-serving hearsay if offered by the other side. Nor will there be a waiver if the  
17 designation is qualified to be operative only in a specified contingency, such as only if issue X  
18 is eventually deemed relevant by the Court. If, however, that contingency materializes, then  
19 such designated materials may be used by the other side, subject to the Rule 702, 703 and  
20 801(d)(2) qualifications stated above.

21 21. Prior to the final pretrial conference, counsel will please meet and confer in  
22 person over all exhibit numbers and objections and to weed out duplicate exhibits and confusion  
23 over the precise exhibit. Use numbers only, not letters, for exhibits, preferably the same  
24 numbers as were used in depositions. Blocks of numbers should be assigned to fit the need of  
25 the case (*e.g.*, Plaintiff has 1 to 100, Defendant A has 101 to 200, Defendant B has 201 to 300,  
26 etc.). A single exhibit should be marked only once, just as it should have been marked only  
27 once in discovery (if this Court's guidelines were followed). If the plaintiff has marked an  
28 exhibit, then the defendant should not re-mark the exact document with another number.

1 Different *versions* of the same document, *e.g.*, a copy with additional handwriting, must be  
2 treated as different exhibits with different numbers. To avoid any party claiming “ownership”  
3 of an exhibit, all exhibits shall be marked and referred to as “Trial Exhibit No. \_\_\_\_\_,” not as  
4 “Plaintiff’s Exhibit” or “Defendant’s Exhibit.” If an exhibit number differs from that used in a  
5 deposition transcript, then the latter transcript must be conformed to the new trial number if and  
6 when the deposition testimony is read to the jury (so as to avoid confusion over exhibit  
7 numbers).

8 22. The exhibit tag shall be in the following form:

9
10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 <b>TRIAL EXHIBIT 100</b>
13 CASE NO. _____
14 DATE ENTERED _____
15 BY _____
16 DEPUTY CLERK
17

18 Place the tag on or near the lower right-hand corner or, if a photograph, on the back. Counsel  
19 should fill in the tag but leave the last two spaces blank. The parties must jointly prepare a  
20 *single* set of all trial exhibits that will be the official record set to be used with the witnesses and  
21 on appeal. Each exhibit must be tagged and in a separate folder (not in notebooks). Deposit the  
22 exhibits with the deputy clerk (Dawn Toland) on the first day of trial.

23 23. Please move exhibits into evidence as soon as the foundation is laid and it is  
24 fresh in the judge’s mind. Do not postpone motions and expect the judge to remember the  
25 foundation. Counsel must consult with each other and with the deputy clerk at the end of each  
26 trial day and compare notes as to which exhibits are in evidence and any limitations thereon.  
27 If there are any differences, counsel should bring them promptly to the Court’s attention.  
28



1 or the final pretrial conference, they should notify the Court immediately in writing or, if it  
2 occurs over the weekend before the trial or conference, by voice mail to the deputy courtroom  
3 clerk. The Court will attempt to confer with counsel as promptly as circumstances permit to  
4 determine if a continuance will be in order. Pending such a conference, however, counsel must  
5 prepare and make all filings and be prepared to proceed with the trial.

6 29. The Court strongly encourages law firms to permit young lawyers to examine  
7 witnesses at trial and to have an important role. It is the way one generation will teach the next  
8 to try cases and to maintain our district's reputation for excellence in trial practice.

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10 **IT IS SO ORDERED.**

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12 Dated: October 28, 2008.

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WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE